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Notes

CERCLA Response Costs and CGL Policies: Insureds Find a Favorable Forum in Missouri

*Farmland Industries, Inc. v. Republic Insurance Co.*¹

I. INTRODUCTION

A comprehensive general liability (CGL) insurance policy typically obligates an insurance provider to indemnify an insured for any damages the insured may become legally obligated to pay because of property damage or personal injury. With regard to environmental liability, tremendous controversy has arisen as to the scope of these policies when they do not specify the liabilities which constitute insurable “damages.” More specifically, this debate has centered around whether environmental cleanup costs (or response costs), as a form of equitable relief, are encompassed by the term “damages” as contained in CGL policies. Insurance providers have historically contended that the definition of “damages” is limited solely to obligations to pay traditional legal remedies, while insureds have argued that the term includes both legal and equitable obligations.

State and federal courts have come down on both sides of the debate. In *Farmland Industries, Inc. v. Republic Insurance Co.*, the Supreme Court of Missouri resolved this issue in favor of insureds. Though the *Farmland* holding is clearly consistent with other courts which have decided this issue under similar rules of insurance policy interpretation, there remains a substantial split of authority. This lack of uniformity has plagued insurers and insureds with uncertainty and confusion concerning their potential responsibility for environmental liability. In turn, this has led to such problems as forum shopping, inefficient use of resources, and the potential demise of the environmental liability insurance market.²

1. 941 S.W.2d 505 (Mo. 1997).

2. See Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 944 (1988); Debi L. Davis, *Insureds Versus Insurers: Litigating Comprehensive General Liability Coverage in the CERCLA Arena-A Losing Battle for Both Sides*, 43 SW. L. J. 969, 992-95 (1990).

II. FACTS AND HOLDING

Farmland Industries, Farmer's Chemical Company, and Union Equity Cooperative Exchange ("Farmland"), as insureds, filed a declaratory judgment action in the Circuit Court of Clay County against the following insurance companies: Republic Insurance Company, Millers' Mutual Insurance Association of Illinois, The Home Insurance Company, The Home Indemnity Company, First State Insurance Company, and Hartford Accident and Indemnity Company ("Insurers").³ Farmland sought a determination that the excess liability policies issued by Insurers⁴ obligated Insurers to indemnify Farmland for environmental response costs incurred under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁵ and similar state laws, and/or to defend Farmland against suits to recover such costs.⁶

More specifically, Farmland averred that the United States Environmental Protection Agency (EPA) and various state agencies had required Farmland to conduct investigation and/or remediation activities pursuant to CERCLA and similar state statutes. They argued that the costs associated with these activities

3. *Id.* at 506.

4. The policies include CGL policies, umbrella policies, and various other excess liability policies. They contain language similar or identical to the following: "The company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as *damages* because of . . . property damage . . ." *Id.* at 507 (emphasis added).

5. 42 U.S.C. §§ 9601 - 9675 (1994).

6. *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 507-08 (Mo. 1997). CERCLA jurisdiction is triggered by the release or threatened release of hazardous substances from a facility into the environment. 42 U.S.C. §§ 9604(a)(1), 9606(a) (1994). Once such a release has occurred, CERCLA imposes strict and potentially joint and several liability on potentially responsible parties ("PRPs"), which include: (1) the current owner and operator of the facility; (2) any past owners and operators of the facility where hazardous substances were disposed of during their ownership or operation; (3) parties that arranged for disposal or treatment of hazardous substances at the facility; and (4) parties that selected the facility for the disposal or treatment of hazardous substances they transported there. 42 U.S.C. § 9607(a) (1994); *see also* *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) (stating that CERCLA imposes strict liability and, in the discretion of the trial court, joint and several liability). Analogous state statutes impose similar liability, though *Farmland* does not identify these state laws. *Farmland*, 941 S.W.2d at 506.

CERCLA makes PRPs responsible for, *inter alia*, the costs incurred in repairing a contaminated site, known as response costs. 42 U.S.C. § 9607(a) (1994). The term "response costs" encompasses two responses to environmental harm: removal and remedial action. Removal means, *inter alia*, "the cleanup or removal of released hazardous substances from the environment." 42 U.S.C. § 9601(23) (1994). Remedial action means, *inter alia*, "those actions consistent with the permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment." 42 U.S.C. § 9601(24) (1994).

were covered by the relevant policies.⁷ Farmland additionally alleged that it faced substantial defense costs and liability for damages arising from alleged property damage and personal injury at sites located in Missouri and other states.⁸

The controversy in this case concerns the meaning of the term “damages” as used in the excess liability policies issued to Farmland by Insurers.⁹ Farmland argued the term included equitable relief, i.e., environmental response costs.¹⁰ Insurers, on the other hand, argued the term “damages” included only legal damages, and that they were not obligated to indemnify Farmland for its liability for environmental response costs or to defend Farmland against suits to recover such costs.¹¹

Farmland moved for partial summary judgment, seeking a declaration that the environmental response costs at issue constituted “damages” under the relevant policies.¹² Insurers filed a cross-motion for summary judgment, contending that the term “damages” did not include environmental response costs.¹³ The trial court denied Farmland’s motion for summary judgment, but granted Insurers’ cross-motion.¹⁴ Farmland appealed, and the case was transferred to the Missouri Supreme Court prior to an opinion of the Missouri Court of Appeals.¹⁵

The Missouri Supreme Court unanimously reversed the trial court and remanded the case for further proceedings.¹⁶ Abrogating *McDonough v. Liberty*

7. *Farmland*, 941 S.W.2d at 508. CERCLA authorizes the President to enter into agreements with PRPs to perform appropriate response actions. 42 U.S.C. § 9622(a) (1994). Upon approval by the Attorney General of the United States, the agreement is entered as a consent decree in the appropriate United States District Court. 42 U.S.C. § 9622(d)(1)(A) (1994). In the instant case, Farmland presented evidence that it had entered into such agreements with the EPA and various state agencies. *Farmland*, 941 S.W.2d at 508.

8. *Farmland*, 941 S.W.2d at 508. These potential costs are not attributable to CERCLA, and therefore, are not pertinent to the court’s holding. Though the court does not specify the grounds for such potential liability, it is likely premised on the common law torts of trespass and nuisance.

9. See *supra* note 4 and accompanying text.

10. *Farmland*, 941 S.W.2d at 508. The parties agreed that environmental response costs constitute equitable relief. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 506.

15. *Id.* MO. R. CIV. P. 83.06 permits a case to be transferred to the Missouri Supreme Court prior to an opinion by the court of appeals, upon application by a party or by the supreme court *sua sponte*, because of the general interest or importance of a question involved in the case, for the purpose of reexamining existing law, or for the purpose of equalizing the work load of the appellate courts.

16. *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 506 (Mo. 1997).

Mutual Insurance Co.,¹⁷ the court held that under Missouri law, when a comprehensive general liability insurance policy indemnifies for damages due to property damage, the term "damages," when given its plain and ordinary meaning, encompasses environmental response costs incurred under CERCLA and similar state statutes.¹⁸

III. LEGAL BACKGROUND

Whether environmental response costs constitute "damages" within the meaning of CGL policies is a controversy dating back nearly half a century. The early cases did not evaluate the scope of CGL policy coverage in the context of statutory environmental liability, such as under CERCLA, but, rather, did so with regard to court-ordered injunctions to conduct environmental cleanup. However, the issue was the same: whether the cleanup costs incurred were "damages" under the relevant CGL policies. The early trend was to exclude cleanup costs from the definition of the term "damages," but in the late 1980's, more courts began to hold that environmental cleanup costs are covered by CGL policies.

This section discusses some of the more notable cases in the history of this debate. The significance of these cases lies in their precedential value as well as their underlying rationale. Moreover, they are illustrative of the inconsistency and lack of uniformity among courts which besets this issue.

A. *Setting Precedent: Distinguishing Between Law and Equity*

*Desrochers v. New York Casualty Co.*¹⁹ and *Aetna Casualty and Surety Co. v. Hanna*²⁰ appear to be the first state and federal circuit cases, respectively, to determine the scope of coverage of CGL policies in the context of environmental liability. By interpolating the common law remedies-at-law/remedies-in-equity dichotomy into the term "damages," these early cases established a precedent in favor of insurance providers by excluding equitable obligations from the purview of CGL policies.

In *Desrochers*, the Supreme Court of New Hampshire held that the term "damages" contained in a comprehensive personal liability (CPL) policy covered only legal remedies and not equitable relief.²¹ The insured alleged that his CPL policy covered costs incurred in complying with an injunction requiring him to

17. 921 S.W.2d 90 (Mo. Ct. App. 1996) (holding that the term "damages" in a CGL policy did not include equitable relief).

18. *Farmland*, 941 S.W.2d at 512.

19. 106 A.2d 196 (N.H. 1954).

20. 224 F.2d. 499 (5th Cir. 1955).

21. *Desrochers*, 106 A.2d at 198. The CPL policy in *Desrochers* provided coverage similar to a typical CGL policy. See *id.*

remove an obstruction to a culvert which had caused flooding of adjoining land. Rejecting the insured's arguments, the court reasoned that legal damages were "recompense for injuries sustained," and as such, were remedial rather than preventive.²² On the other hand, the court held that equitable injunctive relief was premised on the prevention of the recurrence of a past injury, and was therefore not "in any real sense equivalent" to damages.²³

In *Hanna*, the Fifth Circuit expressly adopted the reasoning and result in *Desrochers* in concluding that, under Florida law, the term "damages" in a CPL policy did not include costs incurred in complying with an injunction.²⁴ The injunction required the insureds to remove boulders and fill material from an adjacent property, and to construct a bulkhead between the two properties, the costs of which they alleged were covered by the CPL policy.²⁵ In construing the term "damages," the court noted it had an "accepted technical meaning in law," and concluded that the costs associated with the removal of debris and the construction of a bulkhead—both equitable remedies—were a "far cry" from comporting with this definition.²⁶

B. Abandoning the Desrochers-Hanna Precedent: Ignoring the Law-Equity Distinction

In *United States Aviex Co. v. Travelers Insurance Co.*,²⁷ the Michigan Court of Appeals became the first court to hold that the term "damages" in a CGL policy included environmental cleanup costs.²⁸ The court expressly rejected the *Desrochers* and *Hanna* distinction between law and equity, finding this approach to interpret the term "damages" too narrowly.²⁹ The court reasoned that if a state undertook environmental cleanup and then sued an insured to recover those costs, the obligation of the insurer to defend and indemnify would be undeniable.³⁰ The fact that the state forced the insured to bear full responsibility for environmental cleanup, rather than to undertake such measures itself and seek reimbursement, was merely fortuitous.³¹ Damage to natural resources, the

22. *Id.*

23. *Id.* at 199.

24. *Hanna*, 224 F.2d at 503. The CPL policy in *Hanna* provided coverage similar to a typical CGL policy. *See id.*

25. *Id.* at 501.

26. *Id.* at 503. The *Hanna* court defined "damages" as "[a] pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered loss, detriment or injury, whether to his person, property, or rights, through the unlawful act or negligence of another." *Id.* (citing BLACK'S LAW DICTIONARY (3d ed. 1933)).

27. 336 N.W.2d 838 (Mich. Ct. App. 1983).

28. *See Davis*, *supra* note 2, at 978.

29. *United States Aviex*, 336 N.W.2d at 842-43.

30. *Id.* at 843.

31. *Id.*

court explained, is simply measured as the cost to restore an area to its original state, regardless of which actor undertakes the endeavor.³² "By rejecting the equity-damage distinction in old insurance case law, *U.S. Aviex* set a modern precedent for other courts to follow and is the leading authority for the proposition that environmental cleanup costs are damages under a CGL policy despite the apparent equitable character of the remedy."³³

C. Recent Cases Holding That CGL Policies Do Not Cover Environmental Cleanup Costs

Two significant recent cases holding that environmental cleanup costs are not "damages" are *Maryland Casualty Co. v. Armco, Inc.*³⁴ and *Continental Insurance Co. v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO II)*.³⁵ *Armco* is significant because it appears to be the first case to confront this issue in the context of CERCLA liability. *NEPACCO II* is important because of its interpretation of Missouri law.

In *Armco*, the Fourth Circuit expressly rejected the reasoning in *U.S. Aviex* and held that under Maryland law, the term "damages" excluded CERCLA response costs.³⁶ In reaching this conclusion, the court accorded the term "damages" its legal and technical meaning as suggested in *Hanna*.³⁷ Because response costs are equitable in nature, the court felt that it would be a "great and dangerous step" to begin to construe insurance policies to encompass costs associated with equitable remedies.³⁸ "By coming down squarely in the corner of insurers, the *Armco* decision created precedent that fueled the fire in the battle between insurers and insureds over CGL policy interpretation in the CERCLA arena."³⁹

In *NEPACCO II*, the Eighth Circuit, sitting en banc, reversed its prior panel decision,⁴⁰ and held that under Missouri law, the term "damages" in a CGL policy referred only to legal damages and did not cover environmental response costs incurred under CERCLA.⁴¹ The court's analysis stemmed from its determination that Missouri law required the language of insurance contracts to

32. *Id.*

33. Davis, *supra* note 2, at 979.

34. 822 F.2d 1348 (4th Cir. 1987).

35. 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988).

36. *Armco*, 822 F.2d at 1350.

37. *Id.* at 1352.

38. *Id.* at 1353.

39. Davis, *supra* note 2, at 982.

40. *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d 1180, 1189 (8th Cir. 1987) (*NEPACCO I*) (holding 2-1 that response costs incurred under CERCLA were "damages" within the meaning of a CGL policy).

41. *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 985 (8th Cir.) (*NEPACCO II*), *cert. denied*, 488 U.S. 821 (1988).

be given its plain meaning.⁴² However, the court found the term “damages” to be ambiguous when viewed outside the insurance context, but not when viewed within the insurance context.⁴³ The court concluded that the plain meaning of “damages,” when interpreted within the insurance context, referred only to legal damages and not to equitable relief.⁴⁴

Interestingly, the rationale of the *NEPACCO II* court contained several propositions which the Missouri Supreme Court rejected in *Farmland*. The court reasoned that its narrow construction of “damages” was consistent with the provision of the CGL policy which defined the insurer’s obligation as a whole, to wit: to pay “all sums which the insured shall become legally obligated to pay as damages.”⁴⁵ According to the court, an expansive reading of the term “as damages” would render the term “all sums” meaningless, in that the term “as damages” would be mere surplusage, as any and all obligations to pay would be covered by the policy.⁴⁶

The court also reasoned, citing *Hanna* and *Armco*, that its limited construction was consistent with the distinction traditionally drawn in insurance law between monetary damages and equitable relief.⁴⁷ The court further reasoned that a limited construction of “damages” was consistent with the statutory scheme of CERCLA, which purportedly differentiates between recovery of cleanup costs on the one hand and recovery of damages for injury, destruction, or loss of natural resources on the other.⁴⁸ In the case at bar, the federal and state governments sought only recovery of equitable cleanup costs, which, according to the court, precluded coverage.⁴⁹

D. Recent Cases Holding that CGL Policies Cover Environmental Cleanup Costs

In contrast to the technical meaning accorded the term “damages” by courts such as *Armco* and *NEPACCO II*, recent cases which have interpreted the term to include response costs have uniformly given the term its lay meaning. In *New*

42. *Id.*

43. *Id.*

44. *Id.* at 985-86.

45. *Id.* at 986.

46. *Id.*

47. *Id.*

48. *Id.* Section 9607(a)(4)(A) of CERCLA holds a person liable for “all costs of removal or remedial action,” while Section 9607(a)(4)(C) provides that a person is liable for “damages for injury to, destruction of, or loss of natural resources.” 42 U.S.C. § 9607(a)(4)(A), (C) (1994). The insurer in *NEPACCO II* concluded that this difference in language reflects a congressional intent to distinguish between response costs and damages. *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 986 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988).

49. *NEPACCO II*, 842 F.2d at 987.

Castle County v. Hartford Accident & Indemnity Co.,⁵⁰ the Federal District Court for the District of Delaware held that the term “damages” encompassed claims for equitable relief under Delaware law.⁵¹ The court expressly rejected the application of a legal and technical interpretation of the term as advanced in *Armco*.⁵² The court further noted that standard English dictionaries made no distinction between actions at law and actions in equity. Hence, the ordinary meaning of “damages” included equitable remedies.⁵³

In *Chesapeake Utilities v. American Home Assurance*,⁵⁴ the Federal District Court of Delaware interpreted the term “damages” under both Delaware and Maryland law. In its interpretation of Delaware law, the court declined the invitation to overturn its holding in *New Castle*, touting that decision as a “logical and accurate depiction of Delaware law.”⁵⁵

Construing Maryland law, the court held that it could not be said as a matter of law that cleanup costs were outside the scope of “damages” recoverable under a CGL policy.⁵⁶ The court criticized *Armco* as a misstatement of Maryland law,⁵⁷ finding its narrow, technical definition of “damages” to be grounded upon the “ancient division between law and equity” which did not comport with a lay meaning of the term.⁵⁸ While the court acknowledged the split of authority on this issue, it also noted the growing body of case law that rejected *Armco*’s reasoning.⁵⁹

In *Avondale Industries v. Travelers Indemnity Co.*,⁶⁰ the Second Circuit became the first federal appellate court to hold that environmental cleanup costs are “damages” under a CGL policy.⁶¹ Applying New York law, the Second Circuit held that an insurer was obligated to defend an insured inasmuch as the insured was liable for cleanup costs.⁶² In so holding, the court expressly rejected the holdings of *Armco* and *NEPACCO II*.⁶³ The court noted that New York law required the terms of the policy to be given their natural and reasonable meaning.⁶⁴ The court reasoned that in the absence of clear and unmistakable language to exclude coverage, the ordinary meaning of the term “damages”

50. 673 F. Supp. 1359 (D. Del. 1987).

51. *Id.* at 1367.

52. *Id.* at 1365.

53. *Id.*

54. 704 F. Supp. 551 (D. Del. 1989).

55. *Id.* at 565.

56. *Id.* at 561.

57. *Id.* at 558.

58. *Id.* at 560.

59. *Id.*

60. 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 496 U.S. 906 (1990).

61. *See* Davis, *supra* note 2, at 985.

62. *Avondale Indus.*, 887 F.2d at 1207.

63. *Id.*

64. *Id.* at 1206-07.

included cleanup costs.⁶⁵ The *Avondale* holding is limited to an insurer's duty to defend,⁶⁶ but it "establishes persuasive precedent analytically compatible with the indemnification context."⁶⁷

In *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co. (IPC)*,⁶⁸ the District of Columbia Circuit expressly rejected *NEPACCO II* and held that "damages" included environmental cleanup costs under Missouri law.⁶⁹ In analyzing *NEPACCO II*, the court noted that while it should give deference to a home circuit's view of state law, it should not devote "blind adherence" to such a view.⁷⁰ The court concluded that *NEPACCO II* misread Missouri law and should not be followed.⁷¹ The court reasoned that liability for environmental cleanup costs naturally comports with an ordinary understanding of the term "damages."⁷² As an aside, the *IPC* court mentioned that its research revealed that, with the exception of *NEPACCO II*, courts had uniformly held cleanup costs to constitute "damages" when the operative state's rules of insurance contract construction applied the ordinary meaning test.⁷³

E. The Current Split of Authority

CGL policies have been construed by state and federal courts to cover environmental cleanup costs under the laws of the following states: Alaska,⁷⁴ California,⁷⁵ Colorado,⁷⁶ Delaware,⁷⁷ Georgia,⁷⁸ Idaho,⁷⁹ Illinois,⁸⁰ Iowa,⁸¹

65. *Id.* at 1207.

66. The court did not determine whether the insurer had a duty to indemnify for cleanup costs because that issue was not raised on appeal. *Id.* at 1208.

67. Davis, *supra* note 2, at 985-86.

68. 944 F.2d 940 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 1011 (1992).

69. *Id.* at 947.

70. *Id.* at 944-45.

71. *Id.* at 945.

72. *Id.* at 946.

73. *Id.*

74. *Mapco Alaska Pipeline, Inc. v. Central Nat'l Ins. Co.*, 795 F. Supp. 941, 952 (D. Alaska 1991).

75. *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1269 (Cal. 1990).

76. *Metro Wastewater Reclamation Dist. v. Continental Casualty Co.*, 834 F. Supp. 1254, 1259 (D. Colo. 1993).

77. *National Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co.*, No. 87C-5E-11, 1992 WL 22690, at *12 (Del. Jan. 16, 1992).

78. *Atlantic Wood Indus. v. Lumbermen's Underwriting Alliance*, 396 S.E.2d 541, 543 (Ga. App. 1990), *cert. denied*, 498 U.S. 1085 (1991).

79. *Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1513 (9th Cir. 1991).

80. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1216 (Ill. 1992).

81. *A.Y. McDonald Indus. v. Insurance Co. of N. Am.*, 475 N.W.2d 607, 624 (Iowa 1991).

Kansas,⁸² Maryland,⁸³ Massachusetts,⁸⁴ Michigan,⁸⁵ Minnesota,⁸⁶ Missouri,⁸⁷ Nebraska,⁸⁸ New Hampshire,⁸⁹ New Jersey,⁹⁰ New York,⁹¹ North Carolina,⁹² Ohio,⁹³ Oklahoma,⁹⁴ Oregon,⁹⁵ Pennsylvania,⁹⁶ Texas,⁹⁷ Utah,⁹⁸ Vermont,⁹⁹ and Washington.¹⁰⁰ Not coincidentally, the courts in each of these cases accorded the term "damages" its plain and ordinary meaning.

On the other hand, CGL policies have been interpreted not to cover environmental cleanup costs under the laws of the following states: Arkansas,¹⁰¹

82. *Cessna Aircraft Co. v. Hartford Accident & Indem. Co.*, 900 F. Supp. 1489, 1497 (D. Kan. 1995).

83. *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021, 1032 (Md. 1993).

84. *Hazen Paper Co. v. United States Fidelity & Guar. Co.*, 555 N.E.2d 576, 583 (Mass. 1990).

85. *United States Aviex v. Travelers Ins. Co.*, 336 N.W.2d 838, 843 (Mich. Ct. App. 1983).

86. *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 184 (Minn. 1990).

87. *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 512 (Mo. 1997).

88. *Lindsay Mfg. Co. v. Hartford Accident & Indem. Co.*, 118 F.3d 1263, 1270 (8th Cir. 1997).

89. *Coakley v. Maine Bonding & Cas. Co.*, 618 A.2d 777, 787 (N.H. 1992).

90. *Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am.*, 629 A.2d 831, 846-47 (N.J. 1993).

91. *Avondale Indus. v. Travelers Indem. Co.*, 887 F.2d 1200, 1207 (2d Cir. 1989) (limiting the holding to the insurer's duty to defend).

92. *Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, 388 S.E.2d 557, 569 (N.C. 1990).

93. *Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co.*, 616 N.E.2d 988, 998 (Ohio Ct. App. 1993) (limiting the holding to the insurer's duty to defend).

94. *National Indem. Co. v. United States Pollution Control, Inc.*, 717 F. Supp. 765, 767 (W.D. Okla. 1989).

95. *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 870 P.2d 260, 267 (Ore. Ct. App. 1994).

96. *Federal Ins. Co. v. Susquehanna Broad. Co.*, 727 F. Supp. 169, 174 (M.D. Pa. 1989) (limiting the recovery of damages to the value of the property damaged).

97. *Snydgeneral Corp. v. Century Indem. Co.*, 113 F.3d 536, 539 (5th Cir. 1997).

98. *Quaker State Mini-Lube, Inc. v. Fireman's Fund Ins. Co.*, 868 F. Supp. 1278, 1293-94 (D. Utah 1994).

99. *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023, 1030 (2d Cir. 1991).

100. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 784 P.2d 507, 516 (Wash. 1990).

101. *Parker Solvents Co. v. Royal Ins. Cos. of Am.*, 950 F.2d 571, 571 (8th Cir. 1991) (following *NEPACCO II*).

Connecticut,¹⁰² Florida,¹⁰³ Maine,¹⁰⁴ South Carolina,¹⁰⁵ and Wisconsin.¹⁰⁶ Notably, none of the courts in these cases accorded the term “damages” its plain and ordinary meaning. Clearly, there is a substantial split of authority on this issue, making the Missouri Supreme Court’s decision in *Farmland* all the more significant.

IV. INSTANT DECISION

In *Farmland*, the Missouri Supreme Court held that the term “damages,” as contained in the various CGL and excess liability policies at issue, encompassed equitable relief.¹⁰⁷ The court’s endeavor to define the term turned on its application of Missouri insurance law, which required “damages” to be given its “ordinary meaning” — that which “the average layperson would reasonably understand” — because it was not plainly apparent that a technical meaning was intended.¹⁰⁸ After consulting a standard English dictionary, the court declared the ordinary meaning of “damages” to be “the estimated reparation in money for detriment or injury sustained,” or alternatively, “compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right.”¹⁰⁹ Based on these definitions, the court concluded that a layperson would reasonably understand “damages” to include both legal and equitable relief.¹¹⁰

102. *Linemaster Switch Corp. v. Aetna Life Cas. Corp.*, No. CV 91-03964325, 1995 WL 462270, at *23 (Conn. July 25, 1995) (according the term “damages” a narrow, technical meaning).

103. *Aetna Cas. & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955).

104. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 19 (Me. 1990) (according the term “damages” a narrow, technical meaning).

105. *Braswell v. Faircloth*, 387 S.E.2d 707, 710 (S.C. Ct. App. 1989) (holding that costs incurred to prevent probable environmental damage precluded the existence of property damage).

106. *Regent Ins. Co. v. City of Manitowoc*, 556 N.W.2d 405, 410 (Wis. Ct. App. 1996) (holding that CERCLA’s distinction between “damages” and “cleanup costs” excludes cleanup costs from the definition of “damages”).

107. *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 512 (Mo. 1997).

108. *Id.* at 508. Under Missouri law, the key to insurance policy interpretation is to first determine whether the policy language is ambiguous or unambiguous. *See Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 302 (Mo. 1993). Where ambiguity exists, the policy is enforced against the insurer. *Id.* Where policy language is unambiguous, it is enforced as written absent a statute or public policy considerations requiring coverage. *Id.* Where such language is unambiguous, yet it is disputed whether a term be accorded a technical definition or one that would be reasonably understood by the average layperson, i.e., a plain meaning, the latter prevails. *Id.* at 303.

109. *Farmland*, 941 S.W.2d at 508 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 571 (1961)).

110. *Id.* at 509.

In so holding, the court overruled the contrary conclusion reached by the Eastern District of the Missouri Court of Appeals in *McDonough v. Liberty Mutual Insurance Co.*¹¹¹ The *Farmland* court explained that while *McDonough* correctly stated that Missouri law required the term “damages” to be given its ordinary meaning, it incorrectly defined “damages” as encompassing only legal remedies and not equitable relief.¹¹²

The court rejected a barrage of arguments posited by Insurers, many of which were endorsed by the Eighth Circuit in *NEPACCO II*. First, the court rejected the notion that the term “damages” must be defined within the insurance context because it is ambiguous when viewed outside of that context.¹¹³ The court believed that *NEPACCO II* “misconstrue[d] and circumvent[ed]” Missouri law in defining “damages” in this manner, given the complete absence of authority allowing Missouri courts to do so.¹¹⁴ The court specified that, although it defines a word within the context of the relevant sentence or writing, doing so is quite different from defining a word in the insurance context.¹¹⁵

Second, the court rejected the argument that to define “damages” to encompass both legal and equitable relief would render the term superfluous when read in the context of its general insurance obligation,¹¹⁶ in that any obligation to pay would be covered by the policy.¹¹⁷ The court stated that the ordinary meaning of the term limits its purview to “compensation or reparation for an injury,” thus, excluding from coverage fines and penalties which are imposed as punishment.¹¹⁸

Third, the court rejected the proposition that environmental response costs are costs of doing business—not damages—because they are imposed to enforce compliance with CERCLA and not to compensate a third party for sustained injuries.¹¹⁹ The court noted that CERCLA permits responsible parties to insure against “the cost of actions for which they are liable.”¹²⁰ The court also stressed that it was not its place to disturb the public policy considerations incorporated into CERCLA by Congress; its job was limited to defining the term “damages.”¹²¹

111. 921 S.W.2d 90 (Mo. Ct. App. 1996).

112. *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 509 (Mo. 1997).

113. *Id.* at 510.

114. *Id.*

115. *Id.* The court opined that even if it were to define the term “damages” in the insurance context, it would likely find the term to include equitable relief. *Id.*

116. The court stated: “The company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of . . . property damage . . .” *Id.* at 507.

117. *Id.* at 510-11.

118. *Id.*

119. *Id.* at 511.

120. *Id.* (paraphrasing 42 U.S.C.A. § 9607(e)(1) (1994)).

121. *Id.*

Fourth, the court rejected two parallel arguments that the term “damages” should be defined in light of the circumstances which existed at the time when the policies were purchased. The first argument posited that the policies would have expressly provided for coverage of equitable relief had the parties so intended.¹²² The court retorted that this argument ignored the ordinary meaning of the term “damages.”¹²³ The second argument reasoned that none of the parties could have intended the policies to cover CERCLA response costs when purchased because CERCLA was enacted subsequent to those purchases.¹²⁴ The court responded that because the term “damages” was given its ordinary meaning, it encompasses types of relief not available at the time the policy was drafted.¹²⁵ The court felt that it would “defy logic” to hold that a claim is not covered by an insurance policy merely because it did not exist at the time the policy was purchased.¹²⁶

Finally, the court rejected the argument that CERCLA’s definition of “damages” governed this case.¹²⁷ CERCLA’s definition notwithstanding, the court responded that Missouri law required terms of an insurance policy to be defined in accordance with a standard English dictionary.¹²⁸ When the term “damages” was defined in this manner, the court unanimously concluded that the CGL and excess liability policies at issue covered environmental response costs incurred under CERCLA and analogous state statutes.¹²⁹

V. COMMENT

The Missouri Supreme Court’s interpretation of “damages” in *Farmland* is clearly consistent with other courts which have given that term its plain and ordinary meaning.¹³⁰ Even were there no such consistency, one can hardly criticize the court’s interpretation of “damages” in this manner as untenable or illogical. The average person is most likely not aware of the common law distinction between actions at law and actions in equity; hence, the same person cannot be expected to inject such a distinction into the term “damages.”

Despite the analytical soundness of the *Farmland* decision, holdings of this nature (*i.e.*, those that place ultimate responsibility for environmental cleanup costs on insurers) pose a threat to the continuing availability of environmental liability insurance. Moreover, the current lack of uniformity among courts has

122. *Id.*

123. *Id.*

124. CERCLA was enacted in 1980.

125. *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 511 (Mo. 1997).

126. *Id.*

127. *Id.* at 511-12. See *supra* note 48 and accompanying text.

128. *Farmland*, 941 S.W.2d at 512.

129. *Id.*

130. See *supra* notes 78-94.

created other problems as well, namely, forum shopping and an inefficient use of resources.

A. Potential Demise of the Environmental Liability Insurance Market

Farmland-type decisions ("*Farmland* regime") threaten the existence of the environmental liability insurance market in that they diminish the certainty that insurers have in the calculations upon which they base their policy prices, which in turn diminishes their confidence in their ability to provide effective environmental liability insurance while maintaining solvency.¹³¹ As a result, insurers will either substantially increase policy prices or will forego providing environmental liability insurance altogether.

Insurance typically performs the following three functions: (1) risk transfer from parties who are comparatively risk averse to those more willing to bear the risk; (2) risk spreading by pooling individual risks; and (3) risk allocation by charging premiums that reflect the level of risk posed by each insured.¹³² Insurance can perform these functions effectively and efficiently only under a special condition of uncertainty as to the occurrence of future events.¹³³ To illustrate, imagine a continuum, one end of which is represented by a complete lack of certainty as to the risks posed by potential insureds, while the other end is represented by an absolute certainty of the occurrence of future events. To provide insurance under conditions of complete uncertainty would resemble a raw gamble, because insurers would have no mechanism by which to appropriately allocate risk. On the other hand, complete certainty as to future events obviates the need for insurance, because prospective insureds would have no need to pool and transfer risk. The requisite condition of uncertainty rests on a proper balance between these two extremes. The *Farmland* regime shifts this balance toward uncertainty, thereby making the provision of environmental liability insurance more of a gamble than insurers are willing to bear. The ultimate consequence of this is to force insureds to bear full responsibility for environmental liability, thereby seriously threatening their solvency. At first blush, this result might not seem very disturbing to those who think that it is appropriate for potentially responsible parties (PRPs) under CERCLA to bear full responsibility for the harm they caused. However, such a position is premised on the faulty presumption that those liable under CERCLA are always those that caused the environmental harm. It is important to bear in mind that CERCLA's strict liability regime imposes liability not only without regard to fault, but without regard to causation as well. Therefore, given the scope of parties liable under CERCLA, it is highly possible that a PRP did not in fact cause a particular release of hazardous substances. Thus, it is disturbing that the

131. See Abraham, *supra* note 2, at 955-56.

132. See Abraham, *supra* note 2, at 946.

133. See Abraham, *supra* note 2, at 946.

provision of beneficial products or services may be terminated or discouraged merely because their providers were unable to pool and allocate their risks.¹³⁴

The *Farmland* regime, therefore, is a double-edged sword; it threatens both the continued existence of the environmental liability insurance market and the solvency of insureds. A regime consisting of contrary holdings ("*Hanna* regime"), however, would yield only a slightly more favorable result. Though the environmental liability insurance market would not suffer under the *Hanna* regime, insureds would remain threatened with insolvency, and productive enterprise would in turn be discouraged. Though only a single-edged sword, the *Hanna* regime is a sword nonetheless.

Thus, it is clear that these heightened risks of insolvency are not created by ultimate court decisions, but rather by the mechanism for reaching those decisions: the all-or-nothing assignment of responsibility. The solution, therefore, is a mechanism whereby CERCLA liability is equitably allocated between insurers and insureds.

In *Federal Insurance Co. v. Susquehanna Broadcasting Co.*,¹³⁵ the Federal District Court for the Middle District of Pennsylvania abandoned the all-or-nothing approach in favor of one less extreme and purportedly more effective. Under this approach, CGL coverage is available only if property damage has actually occurred; coverage is not available if preventive or mitigating measures are taken before a hazardous substance release has occurred.¹³⁶ However, once property damage has occurred, the insurer's liability is based on the degree of damage. If the property damage is reparable, the insurer is responsible for cleanup costs to the extent of the fair market value of the property; the insured is responsible for any excess.¹³⁷ If the property damage is irreparable, the insurer's responsibility is equivalent to the decrease in its fair market value.¹³⁸

Although this approach ostensibly distributes liability in a more equitable fashion than does the all-or-nothing approach, it has one major flaw. Since

134. This is not to say that productive enterprise takes priority over the prevention of environmental harm. However, in the author's opinion, it is undisputable that the provision of certain products or services, though potentially harmful to the environment, are beneficial, if not indispensable, to modern society. Responsibility for the environmental risks posed by these activities can be assumed via the purchase of appropriately-priced insurance policies. Any realization of actual or threatened environmental harm will thereby be remedied through insurance proceeds, although ex post remedies cannot always restore the environment to its pre-harm condition. Under such a scenario, it is arguably preferable to enable parties to conduct productive activities, while simultaneously assuming responsibility for their environmental risks by purchasing insurance, rather than to discourage the productive enterprises altogether.

135. 727 F. Supp. 169 (M.D. Pa. 1989), *amended on reconsideration in part* by 738 F. Supp. 896 (M.D. Pa. 1990), *aff'd*, 928 F.2d 1131 (3d Cir.), *cert. denied*, 502 U.S. 823 (1991).

136. *Id.* at 174.

137. *Id.*

138. *Id.*

coverage is not available until property damage has occurred, it creates a disincentive for parties to take proactive measures to prevent or mitigate damage caused by a threatened release of hazardous substances. Such a disincentive is both environmentally harmful and inefficient, because cleanup costs increase with the property damage.

As another alternative to the all-or-nothing approach, one commentator recommends revamping CERCLA to equitably apportion retroactive liability between insurers and insureds.¹³⁹ To date, the majority (if not all) of the litigation surrounding this issue has involved CGL policies purchased prior to the enactment of CERCLA. Herein lies the problem: the parties are litigating the coverage of a liability which neither was aware of at the time the pertinent policies were purchased. Insurers argue they should not be responsible for liabilities not in existence at the time the relevant policies were issued, e.g., CERCLA, because the purchase and premium prices were based on existing liabilities. Insureds, on the other hand, argue that they purchased these policies to protect against such unexpected liability, and that it is therefore irrelevant that the liability did not exist when the policies were issued. Both arguments seem plausible. However, it seems unfair to hold one party fully responsible while excusing the other. Apportioning responsibility between the parties seems very appropriate, as each side is held responsible (albeit partially) for a cost it may well have been fully responsible for, while not letting either side entirely off the hook. Furthermore, this approach appears to provide for environmental reparation while ensuring party solvency more effectively than does the all-or-nothing approach.

A common-sense alternative, and one that does not require judicial or Congressional action, is for insurers and insureds to specify the precise liabilities covered by their policies during purchase negotiations.¹⁴⁰ This approach obviates the need for litigation since the scope of the policy is clear. Furthermore, it effectively holds insureds fully responsible for the environmental damage caused by their operations. For those liabilities specifically covered by the policy, responsibility will have been accepted via the payment of premiums.¹⁴¹ For those potential environmental liabilities not expressly covered, responsibility will be accepted by the insured if and when the liability arises. Though the latter scenario may threaten insureds with insolvency, fairness requires them to accept such a risk if they engage in potentially environmentally harmful activities.

139. See Davis, *supra* note 2, at 996-98. CERCLA imposes liability for hazardous waste releases occurring prior to its enactment. See *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997).

140. This approach can only have prospective application, i.e., it would not solve the dispute encountered in *Farmland*.

141. Assuming the premium price is commensurate with the environmental risk posed.

B. Forum Shopping and Preemptive Filing

Because many businesses and insurance companies conduct activities in several states, several judicial fora are available to them. The combination of a lack of uniformity among courts and multi-forum availability results in forum shopping and preemptive filing—a race to the most favorable courthouse among potential litigants.¹⁴² These disputes, therefore, are not decided on the merits, but rather on the relative expediency with which one of the parties is able to file the initial pleading. Considering that our system of jurisprudence disapproves of forum shopping (prevention of forum shopping is one of the rationales underlying the *Erie* doctrine), this result seems highly inequitable.

Uniformity would obviously resolve this problem. However, unless Congress were to revamp CERCLA in the manner previously described, the likelihood of achieving uniformity is small, given the differences in state insurance law.

C. Inefficient Use of Resources

The litigation that results from the lack of uniformity consumes large amounts of time and money. The amount of money spent in this effort reduces the amount available to remedy environmental damage. The amount of time required by litigation often delays cleanup efforts, which increases the likelihood of additional environmental harm, which in turn increases the possibility of additional environmental liability. Though it is ultimately cheaper for the successful litigant to resolve this matter in court, the current process is inefficient when viewed as a whole. The resources spent on litigation would better benefit societal interests if applied to environmental reparation.¹⁴³ Absent modification of CERCLA, this situation is likely to persist, as the chances of abolishing the current lack of uniformity by any other means are small.

VI. CONCLUSION

In *Farmland Industries, Inc. v. Republic Insurance Co.*, the Missouri Supreme Court held that environmental response costs incurred under CERCLA and similar state statutes are covered by comprehensive general liability (CGL) and various other excess liability insurance policies. More specifically, the court defined the term “damages” contained in these policies to encompass both legal and equitable remedies (e.g., environmental response costs, when given its plain and ordinary meaning). Though there is a substantial split of authority on this issue among both state and federal courts, *Farmland* is clearly consistent with other courts which have given the term “damages” its ordinary meaning.

142. See Davis, *supra* note 2, at 994-95.

143. See Davis, *supra* note 27, at 932-33.

However, this holding is not unproblematic. The present lack of uniformity among courts concerning these issues results in forum shopping and an inefficient use of resources. Moreover, the current all-or-nothing approach of determining CGL policy coverage threatens the continued existence of the environmental liability insurance market, and ultimately, insured solvency.

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